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No. 92-248

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM O. MOZEE, *et al.*,
Petitioners,

v.

AMERICAN COMMERCIAL MARINE SERVICE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly ruled that the Civil Rights Act of 1991 does not apply to cases pending on appeal on the Act's effective date?

LIST OF PARTIES

Petitioners have correctly identified all of the parties to the proceeding in the court below.

Respondent American Commercial Marine Service Company, Jeffboat Division (formerly Jeffboat, Inc.) is a wholly owned subsidiary of American Commercial Lines, Inc. There are no other subsidiaries of American Commercial Lines, Inc. that it does not wholly own.

American Commercial Lines, is a wholly owned subsidiary of CSX Corporation. Other subsidiaries of CSX Corporation that are not wholly owned by it or by a wholly owned subsidiary are listed in an appendix to this brief.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent American Commercial Marine Service Company, Jeffboat Division ("Jeffboat"),[1] hereby opposes the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Seventh Circuit in this case.

STATEMENT OF THE CASE

1. Petitioners William O. Mozee, Gregory L. Rankin, Frederick Williams, and Joe Malone, African-Americans who were formerly employed by Jeffboat, filed their class action race discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and

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[1] At the time this litigation commenced, Respondent's Jeffboat Division was separately incorporated as Jeffboat, Inc.

42 U.S.C. § 1981 in 1977, alleging that Respondent had engaged in a pattern and practice of race discrimination against its African-American employees. The individual complaint of petitioner Harold Barnes, filed in 1978, was consolidated with *Mozee* for trial, which was held over a four-month period in 1981-82. At the close of the evidence, the district court entered judgment in favor of Jeffboat and against Petitioners on each of their individual and class claims.

Petitioners appealed to the Seventh Circuit. The court of appeals vacated the district court's judgment and remanded for a new trial on the ground that "the findings of fact made after trial by the district court [are] insufficient to permit meaningful appellate review." *Mozee* v. *Jeffboat, Inc.*, 746 F.2d 365, 367 (7th Cir. 1984).

2. On remand to the district court, the parties submitted the written record from the first trial as part of the record to be considered by the court at the second trial. In addition, the parties presented additional evidence concerning Jeffboat's pre-1980 employment practices during the 1986 retrial.

On March 17, 1988, the district court issued its rulings on liability. The court acknowledged that Jeffboat had consistently hired African-Americans in greater numbers than their representation in the surrounding labor market. It also found that Jeffboat had not discriminated in the areas of training for higher-rated positions, promotion from bargaining unit positions to salaried nonunit foreman and higher managerial positions, special job assignments, and the assignment of employees to vacant positions in the bargaining unit in accordance with the seniority system in the applicable collective bargaining agreement. However, the court concluded that Plaintiffs had shown that Jeffboat had violated Title VII and Section 1981 in the selection of leadmen and gantry crane operators and in the imposition of discipline for violations of company rules.

Following this Court's decisions in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), and *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), Jeffboat requested reconsideration of certain of the liability findings. The district court concluded that its findings under Section 1981 survived *Patterson* and also declined to reconsider its rulings in light of *Wards Cove*.

On June 7, 1990, the district court determined the amounts of back pay to which the named plaintiffs were entitled under Title VII and Section 1981. Petitioners Mozee and Barnes, the only two plaintiffs with viable Section 1981 claims,[2] were also awarded $5,000 each for emotional distress. The court deferred consideration of any class-wide award of punitive damages under Section 1981. The district court then certified its liability orders for interlocutory review under 28 U.S.C. § 1292(b).

3. On August 14, 1991, the Seventh Circuit reversed the named plaintiffs' and the class-wide claims under Section 1981 based on *Patterson*. It affirmed the named plaintiffs' individual Title VII claims, and it affirmed the finding of class-wide liability under Title VII in promotions to the leadman and gantry crane operator positions. It vacated and remanded the findings of a class-wide Title VII violation based on Jeffboat's disciplinary practices.

4. While petitions for rehearing were pending, Congress passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 ("1991 CRA"). The Act became effective on November 21, 1991. The court of appeals asked the parties to brief the issue of the effects, if any, of the new statute on this case.

On May 7, 1992, the Seventh Circuit issued its decision on rehearing. Pet. App. 1a-24a. The court observed that the plaintiffs had argued that several sections of the 1991 CRA should be applied to this case: (1) Section 101(b),

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[2] The district court had dismissed the Section 1981 claims of the remaining named plaintiffs based on the statute of limitations.

"which expands the definition of what constitutes the making and enforcement of a contract for section 1981 claims"; (2) Sections 104 and 105, "which pertain to the business necessity defense for disparate impact cases under Title VII"; (3) Section 102, "which makes compensatory and punitive damages available for intentional discrimination claims under Title VII." Pet. App. 3a.[3]

The court first examined the language of the 1991 CRA and the legislative history of the 1991 Act. It concluded that "[a] clear indication of congressional intent cannot be deciphered from the legislative history or the 1991 Act's language." Pet. App. 8a.

The court then relied upon language in *Bennett* v. *New Jersey*, 470 U.S. 632, 639 (1985), for the proposition that "statutes affecting substantive rights and liabilities are presumed to have only prospective effect." Pet. App. 13a. Accordingly, the court determined that none of the 1991 CRA's substantive changes should apply retroactively, either in the court of appeals or on remand in the district court. Pet. App. 13a-14a.

The court next considered whether to apply the 1991 Act's procedural and damages provisions on remand. It identified, but declined to decide, the issue of whether these provisions generally should be applied in a pending case challenging preenactment employer conduct where no proceedings had as yet taken place in the district court.[4]

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[3] The court noted that plaintiffs had also referred to Section 102(c), "which pertains to the availability of a jury trial under Title VII," but observed that they had apparently conceded that any right to a jury trial as a result of Section 102(c) had been waived. Pet. App. 3a & n.1. In their petition to this Court, Petitioners confirm that the availability of a jury trial under Section 102(c) of the 1991 CRA is not at issue here. Pet. 5 n.4.

[4] The court observed that the Sixth Circuit's recent decision in *Vogel* v. *Cincinnati*, 959 F.2d 594 (6th Cir. 1992), stood for the proposition that, because some of the 1991 Act's provisions affected

Instead, the court noted that its earlier decision had affirmed in part, reversed in part, and vacated and remanded in part the district court's liability findings. Accordingly, the remand would not require an entirely new proceeding. Under these circumstances, the court decided that it would be confusing and inequitable to apply procedural and damages changes flowing from the 1991 CRA to this case on remand. "Considering that the interlocutory remand in *Mozee II* will not initiate an entirely new proceeding, the district court should not apply any of the 1991 Civil Rights Act's provisions on remand." Pet. App. 21a.

ARGUMENT

Contrary to Petitioners' assertions, this does not present any issues mertiting review by this Court. The courts of appeals have uniformly ruled that the 1991 Civil Rights Act does not apply retroactively to cases pending on appeal on the date of its enactment. Nor does this case present an appropriate vehicle for resolving whatever tension may exist in other contexts and under other statutes concerning this Court's decisions on retroactivity; the courts of appeals have concluded that the 1991 CRA does not apply to cases pending on appeal on its effective date regardless of which of this Court's precedents are followed.

In addition, the decision below is correct. The court properly applied this Court's decisions and reached a result consistent with the intent of the 1991 CRA as manifested in both the legislative and executive branches. Finally, the unique procedural posture of this case makes it an unsuitable vehicle for determining whether the 1991 CRA applies generally to cases challenging pre-enactment conduct, even if that general issue otherwise warranted review by this Court.

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substantive rights, the entire act should be applied prospectively and commented that "[t]his position is not without merit." Pet. App. 21a.

1. As Petitioners acknowledge (Pet. 13-15), every court of appeals that has considered the effect of the 1991 CRA on cases pending on the Act's effective date has held that the Act does not apply. The Fifth, Sixth, Seventh, and Eighth Circuits all have concluded that the 1991 CRA does not apply retroactively to pending cases.[5] In particular, these courts have uniformly determined that it would be inappropriate to give a retroactive application to the three 1991 CRA sections that Petitioners urge this Court to apply in this case—Sections 101, 102, and 105.

The courts of appeals in the remaining circuits have not yet addressed the retroactivity of the 1991 CRA. While some early district court decisions in those circuits applied the amendments retroactively (see Pet. 15-17), more recent district court decisions from those circuits, issued in the wake of the uniform court of appeals rulings cited above, have found almost universally that the 1991 CRA does not apply to cases pending on the effective date.[6]

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[5] In addition to the decision below, see *Johnson* v. *Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Landgraf* v. *USI Film Products*, 1992 WL 178737 (5th Cir. July 30, 1992); *Rowe* v. *Sullivan*, 967 F.2d 186 (5th Cir. 1992); *Vogel* v. *City of Cincinnati*, 958 F.2d 594 (6th Cir. 1992), *petition for cert. filed*, No. 91-2001, 60 U.S.L.W. 3881 (June 11, 1992); *Luddington* v. *Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992), *petition for rehearing filed*, No. 91-2320 (7th Cir. July 13, 1992); *Fray* v. *Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992), *petition for rehearing filed*, Nos. 91-2439, 91-2443, and 91-2713 (8th Cir. Apr. 27, 1992); *Valdez* v. *Mercy Hosp.*, 961 F.2d 1401 (8th Cir. 1992); *Huey* v. *Sullivan*, 1992 WL 181142 (8th Cir. July 30, 1992); *Parton* v. *GTE North, Inc.*, 1992 WL 179687 (8th Cir. July 31, 1992).

[6] Cases from other circuits that have relied upon and followed the uniform court of appeals decisions include:

First Circuit—*Virapen* v. *Eli Lilly, S.A.*, 1992 WL 150879 (D. P.R. June 25, 1992).

Second Circuit—*Gilmore* v. *Local 295, Teamsters*, 1992 WL 188300 (S.D. N.Y. Aug. 6, 1992); *Stout* v. *International Business Machines*, 1992 WL 166846 (S.D. N.Y. July 16, 1992; *Kelber* v.

There is no reason to presume that those circuits will not join the four that have to date found the Act to be prospective only. If not, however, this Court could review the issue at that time. S.Ct. Rule 10.1.

2. This case also presents a poor vehicle to resolve any tension that may exist among different decisions of this

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Forest Electric Corp., 1992 WL 189247 (S.D. N.Y. July 7, 1992); *Boss* v. *Board of Ed., Union Free School Dist.*, 1992 WL 160398 (E.D. N.Y. July 6, 1992); *Smith* v. *Petra Cablevision Corp.*, 1992 WL 108356 (E.D. N.Y. May 20, 1992); *Sava* v. *General Electric Co.*, 789 F.Supp. 78 (D. Conn. 1992).

Third Circuit—*Aiken* v. *Bucks Ass'n for Retarded Citizens, Inc.*, 1992 WL 186582 (E.D. Pa. July 14, 1992); *Thompson* v. *Prudential Inc. Co. of America*, 1992 WL 140825 (D. N.J. June 23, 1992); *Neibauer* v. *Philadelphia College of Pharmacy and Science*, 1992 WL 151321 (E.D. Pa. June 19, 1992); *Konstantopoulos* v. *Westvaco Corp.*, 1992 WL 162957 (D. Del. June 19, 1992); *Crumley* v. *Delaware State College*, 1992 WL 142243 (D. Del. June 11, 1992); *Haynes* v. *Glen Mills Schools*, 1992 WL 97904 (E.D. Pa. May 6, 1992).

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Tenth Circuit—*Bullock* v. *Dillard Dept. Stores, Inc.*, 1992 WL 167015 (D. Kan. June 1, 1992); *Donaldson* v. *Brady*, 1992 WL 119497 (D. Colo. May 14, 1992); *Maxwell* v. *Handicapped Educ. & Living Programs, Inc.*, 1992 WL 97801 (D. Kan. Apr. 13, 1992); *Brown* v. *Anheuser-Busch, Inc.*, 1992 WL 78065 (D. Colo. Mar. 31, 1992).

Eleventh Circuit—*King* v. *Tandy Corp.*, 1992 WL 174289 (M.D. Ga. July 24, 1992).

Contra, *Wisdom* v. *Intrepid Sea-Air Museum*, 1992 WL 168224 (S.D. N.Y. June 26, 1992); *Jaekel* v. *Equifax Marketing Decisions Systems, Inc.*, 1992 U.S. Dist. LEXIS 9489 (E.D. Va. June 26, 1992); *Tyler* v. *Commonwealth of Pa., Dept. of Revenue*, 1992 WL 133481 (M.D. Pa. June 4, 1992); *Savko* v. *Port Auth. of Allegheny County*, 1992 WL 110466 (W.D. Pa. May 22, 1992); *Robinson* v. *Davis Memorial Goodwill Indus.*, 790 F.Supp. 325 (D.D.C. 1992).

Court on the general issue of retroactivity. To be sure, there has on occasion been some confusion among lower federal courts concerning other federal statutes (see Pet. 8-13). But there have been no such conflicting court of appeals decisions under the 1991 CRA. The courts of appeals, including the court below, have uniformly ruled that the 1991 CRA does not apply to cases pending on appeal on the Act's effective date regardless of which of this Court's decisions are applied. *Compare Bennett, supra*, and *Bowen* v. *Georgetown Univ. Hosp.* 488 U.S. 204 (1988), with *Thorpe* v. *Housing Auth. of the City of Durham*, 393 U.S. 268 (1968), and *Bradley* v. *School Board*, 416 U.S. 696 (1974).

Accordingly, if some clarification of the general rules on the application of newly enacted statutes to pending cases is necessary, it should arise under circumstances where the courts disagree about the proper approach to the particular statute at issue. In that way, the clarification will affect the outcome of the case.

3. Nor is there merit in Petitioners' assertions that the petition should be granted because the decision below was in error.

No court of appeals has accepted Petitioner's argument (Pet. 18) that Section 101 of the 1991 CRA should be applied retroactively because it merely resulted in the prohibition of conduct already subject to Title VII. As Judge Posner demonstrated in writing for the court in *Luddington*, Section 101 is clearly substantive, bringing as it does new forms of employer conduct (*e.g.*, discharges and refusals to make an ordinary promotion or a lateral transfer) within the scope of 42 U.S.C. § 1981's prohibitions. 966 F.2d at 229.[7] Moreover, even if the expansion

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[7] Petitioners are in error when they assert that Section 1981 and Title VII are merely substantive duplicates of each other. Section 1981 applies to many employers not covered by Title VII: those with fewer than 15 employees. *See* Title VII § 701(b), 42 U.S.C. § 2000e(b). Moreover, claims under Title VII must be filed

of Section 1981's coverage could be characterized as merely an enhancement of the remedies available to victims of employment discrimination, the impact of that change requires that it be made on a prospective basis only, as Judge Posner explained:

> It could be argued that since the underlying norm of nondiscrimination was not new, employers should not be heard to complain that the norm has now been given teeth. But many of us would squawk very loudly indeed if people with unpaid parking tickets were made retroactively liable to life imprisonment; and in fact such a change although purely remedial would violate the ex post facto clause. *Miller* v. *Florida*, 482 U.S. 423 (1987); *Sequoia Books, Inc.* v. *Ingemunson*, 901 F.2d 630, 639 (7th Cir. 1990). The amount of care that individuals and firms take to avoid subjecting themselves to liability whether civil or criminal is a function of the severity of the sanction, and when the severity is increased they are entitled to an opportunity to readjust their level of care in light of the new environment created by the change.

966 F.2d at 229.

For these same reasons, there is no merit to Petitioners' claim (Pet. 18-19) that the court below erred in not applying on remand the new provisions for compensatory and

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with the Equal Employment Opportunity Commission within at most 300 days of the challenged employer action. Title VII § 706(e), 42 U.S.C. § 2000e-5(e). Claims under Section 1981 can be brought directly to court within a limitations period borrowed from applicable state law (*see Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975)), which is generally longer than the charge-filing period under Title VII. Accordingly, employees whose Title VII claims are barred because they were not pursued in timely fashion may still be able to pursue claims of violations under Section 1981. Under these circumstances, it can hardly be argued that the 1991 CRA's expansion of conduct prohibited under Section 1981 did not alter an employer's substantive obligations or expose an employer to substantially greater liabilities.

punitive damages under Title VII in Section 102 of the 1991 CRA. Subjecting Jeffboat to damages of up to $300,000 per claimant, in addition to back pay and other equitable relief, for conduct that occurred nearly 20 years before the 1991 CRA's passage would result in manifest injustice. As the Fifth Circuit explained in *Landgraf*, 1992 WL 178737, *5, "[t]here is a practical point at which a dramatic change in the remedial consequences of a rule works changé in the normative reach of the rule itself."

Second, Petitioners err when they assert that the court below failed to acknowledge that Congress' intent in enacting Section 101 was merely to "restore" the interpretation of Section 1981 that certain lower courts had given it prior to *Patterson*. Pet. 18. The express terms of the 1991 CRA belie any such restorative purpose. The congressional "findings" accompanying the 1991 Act refer in forward-looking terms to the need for "*additional* remedies" and "*additional* protections" against unlawful employment discrimination. 1991 CRA § 2 (emphasis added). Pet. App. 64a. The "purposes" of the Act set forth in Section 3 are similarly prospective in nature.[8]

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[8] 1991 CRA § 3 (Pet. App. 64a-65a) provides (emphasis added):

> The purposes of this Act are—
>
> (1) *to provide appropriate remedies* for intentional discrimination and unlawful harassment in the workplace;
>
> (2) *to codify the concepts* of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);
>
> (3) *to confirm statutory authority and provide statutory guidelines* for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and
>
> (4) *to respond* to recent decisions of the Supreme Court *by expanding the scope* of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Notably absent is any stated purpose to "restore" the law.[9]

Finally, as Petitioners acknowledge (Pet. 20 n.16), every court of appeals has rejected their argument that the plain language of the 1991 CRA establishes that it must be retroactively applied. No court of appeals has found that the inclusion of the special provision in Section 402(b), negating any possible retroactive application to the Wards Cove Packing Company of the new burdens of persuasion in 1991 CRA § 105, or Section 109(c), which ensures that the new imposition of liability on employers for extraterritorial conduct does not apply retroactively, establishes that it was Congress' intent that the Act as a whole applies to pending cases. *See Fray*, 960 F.2d at 1376-77; *Johnson*, 965 F.2d at 1373; *Mozee*, Pet. App. 5a-7a.

4. Finally, the instant case would be a poor vehicle for resolving the general issue of the impact of the 1991 CRA on pre-enactment employer conduct. The vast majority of cases in which this issue will arise are ones

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[9] In marked contrast, the 1990 Civil Rights Act, a precursor to the 1991 CRA that was vetoed by President Bush, contained an express statement of Congress' restorative purpose. The first stated purpose of the 1990 Act was to "respond to the Supreme Court's recent decisions *by restoring* the civil rights protections that were dramatically limited by those decisions. . . ." S. 2104, § 2(b)(1), 101st Cong., 2d Sess. (1990), 136 Cong. Rec. H 9552 (daily ed. Oct. 12, 1990) (emphasis added). The civil rights bill that passed the House of Representatives early in the summer of 1991 contained an identical statement of congressional purpose. H.R. 1, § 2(b)(1), 102d Cong., 1st Sess. (1991), 137 Cong. Rec. H 3923 (daily ed. June 5, 1991). Consistent with such a purpose, both the 1990 Act and 1991's H.R. 1 were by their terms expressly retroactive and would have applied to pending cases, S. 2104, § 15(a), 101st Cong., 2d Sess. (1990), 136 Cong. Rec. H 9552 (daily ed. Oct. 12, 1990); H.R. 1, § 15(a), 102d Cong., 1st Sess. (1991), 137 Cong. Rec. H 3923 (daily ed. June 5, 1991). When the Civil Rights Act of 1991 was passed, all references to "restorative" intent, like the provisions for express retroactivity, were deleted.

that were pending in the trial courts awaiting adjudication on the date of enactment or that will have been filed since November 21, 1991, but that challenge pre-enactment employment actions. Relatively few cases were, like the instant case, pending on appeal on the enactment date, and this special class of cases will soon have left the judicial system.

Moreover, this case was filed in 1977, had already been through two full trials on liability, and was pending before the court of appeals on an interlocutory appeal from all liability findings on the effective date of the new Act. The evidence presented by Petitioners at both the first and second trials largely centered on Respondent's employment practices during the latter half of the 1970's, nearly two decades before the 1991 Act's passage. In its August 14, 1991, initial opinion, the court below disposed of virtually all of the liability issues, leaving the district court only to reconsider its findings on classwide disciplinary claims under Title VII (and to take additional evidence on this one issue if the court sees fit).

Under these special circumstances, the court below properly applied equity and justice in its determination that Respondent not be subjected to new substantive rules and unanticipated new liabilities years after the fact. As Judge Wood explained for the court:

> We must remember that this case has been in litigation for fifteen years. A remand under a new statute after fifteen years of litigation seems anything but just.

Pet. App. 17a-18a n.4.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 4, 1992

APPENDIX

RELATED PARTIES

The subsidiaries of CSX Corporation that are not wholly owned by it or by a wholly owned subsidiary are:

Akron and Barberton Belt Railroad Company
Akron Union Passenger Depot Company
Allegheny and Western Railway Company
Augusta and Summerville Railroad Company
Baltimore and Cumberland Valley Rail Road Extension Company
Baronial Transportation Corporation
Beaver Street Tower Company
Belt Railway Company of Chicago
Central Florida Pipeline Corporation
Central Rail Road Company of South Carolina
Central Transfer Railway and Storage Company
Chatham Terminal Company
Chicago and Western Indiana Railroad Company
Clearfield and Mahoning Railway Company
Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
Green Real Estate Company
Home Avenue Railroad Company
Lakefront Dock and Railroad Terminal Company
Mid Allegheny Corporation
Nicholas, Fayette and Greenbrier Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
North Charleston Terminal Company
Paducah & Illinois Railroad Company
Richmond-Washington Company
RF&P Corporation
Terminal Railroad Association of St. Louis
Trailer Train Company
Wesjax Development Company
Winston-Salem Southbound Railway Company
Woodstock & Blocton Railway Company
Yukon Pacific Corporation